IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1606

CONSUMERS UNION OF THE UNITED STATES, INC. and EDWARD J. GORIN,

Appellants,

v.

MURIEL SIEBERT, Superintendent of Banks of the State of New York,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

ALAN MARK SILBERGELD
MARK A. CYMROT

1714 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 785-1906

Attorneys for Appellants

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1606

CONSUMERS UNION OF THE UNITED STATES, INC. and EDWARD J. GORIN,

Appellants,

v.

MURIEL SIEBERT, Superintendent of Banks of the State of New York, [1]

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Appellants have challenged the constitutionality of Section 268 of the Banking Law of New York (McKinney 1971), under the Commerce Clause, Art. I, § 3 and the Privileges and Immunities Clause of Art. IV, § 2 of the

---

[1] Muriel Siebert is substituted as appellee for John G. Heimann pursuant to Rule 48(3) of the Rules of the Supreme Court.

U.S. Constitution. Section 268 prohibits the sale of savings bank life insurance ("SBLI") by New York savings institutions to non-residents of New York who do not regularly work in New York.[2]

A. Commerce Clause Art. I, § 3

Appellee contends that Section 268 is constitutional because ". . . the Commerce Clause [does not] affirmatively [require] a state, or private manufacturer, to place an article in interstate commerce."[3] This statement misconstrues the issue. Appellants do not argue that New York must place SBLI into interstate commerce, merely that New York cannot prevent SBLI from naturally flowing into interstate commerce. ". . . [T]he very purpose of the Commerce Clause was to create an area of free trade among the states." *Great Atlantic and Pacific Tea Company v. Cottrell*, 424 U.S. 366, 370 (1976). Accordingly, state export embargoes have consistently been struck down by the Court as an impermissible means to safeguard state interests.[4] *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (export embargo on unpackaged cantalopes); *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539 (1949) (milk); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928) (unprocessed shrimp); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (natural gas); *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911) (natural gas).[5] *Cf.*, *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1925) (grain); *Lemke v. Farmers Grain Co.*, 258 U.S. 50 (1922). Thus while New York can regulate SBLI to accomplish local objectives, these objectives cannot be accomplished through an export embargo.

---

[2] Section 268 is quoted in Appellants' Jurisdictional Statement at 2.

[3] Appellee's Motion to Dismiss or Affirm at 3 (hereinafter, Appellee's Motion).

[4] Likewise, state import prohibitions have been treated with disfavor by the Court, e.g. *Great Atlantic & Pacific Tea Co. v. Cottrell, supra, Brimmer v. Rebman*, 138 U.S. 78 (1891).

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1115, does not change this result.[6] In interpreting a similar provision in the Natural Gas Act, 15 U.S.C. § 717, the Court in *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U.S. 507, 522-523 (1947) said:

> For itself, the company asserts that state regulation of prices and service will amount to a power of blocking the commerce or impeding its free flow . . . State power to regulate interstate commerce, wherever it exists, is not the power to destroy it, unless Congress has expressly so provided. It is the power to require that it be done on terms reasonably related to the necessity for protecting the local interest on which the power rests.

Congress has not expressly given the states the power to destroy interstate commerce in life insurance through an embargo. The McCarran-Ferguson Act gave the states no more power to regulate the business of insurance beyond what they possessed prior to the *South-Eastern Underwrit-*

---

[5] See generally *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 186-187 (1950), where the Court said that state regulation cannot, ". . . discriminate against or *place an embargo on* interstate commerce. . ." [Emphasis added]

[6] The district court assumed *arguendo* that the McCarran-Ferguson Act was inapplicable. App. 11a-12a.

ers case.[7] See *S.E.C. v. National Securities Inc.*, 393 U.S. 453, 459 (1969), *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451 (1962). As previously noted, states cannot place embargoes on interstate commerce. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946), relied upon by appellee,[8] did not involve an embargo on interstate commerce and, therefore, did not reach the issue in this case. *Cf., F.T.C. v. Travelers Health Association*, 362 U.S. 293, 300 (1960).

B. Privileges and Immunities Clause, Art. IV, § 2

Appellee contends that Section 268 does not transgress the Privilege and Immunities Clause, Art. VI, § 2, because it does not adopt state citizenship or residency as a classifying criterion.[9] However, residency clearly is the classifying criterion. The statute limits the sale of SBLI insurance to residents of New York and one class of non-residents, i.e. those who regularly work in New York. The state cannot neatly avoid the requirements of the Privileges and Immunities Clause merely by including one class of non-residents within the state. The clear thrust of Section 268 is to discriminate against non-residents of New York.

Further, the appellee would have the Court tie itself to a mechanical rule that any state statute is constitutional which adopts residence and not citizenship as the classifying criterion.[10] This Court has never found itself bound by such a rule. See, for example, *Doe v. Bolton*, 410 U.S. 179 (1973), *Toomer v. Witsell*, 334 U.S. 385 (1948). The clear meaning and effect of Section 268 is to discriminate against non-citizens of New York. Therefore the statute is unconstitutional.

Appellee contends that the district court's justifications of Section 268 satisfy the test for the Privileges and Immunities Clause.[11] The district court found that the statute was adopted as a means to limit the life insurance business of savings institutions, to provide a benefit to those with an economic nexus to the state, and to preserve the local character of savings institutions. App. 6a-7a. These justifications do not withstand scrutiny.

In *Toomer v. Witsell, supra* at 398, the Court said that discrimination against non-citizens is impermissible, ". . . unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." Non-residents of New York will not uniquely cause an imbalance within the savings institutions of insurance business over savings business. The same imbalance could be caused by excess insurance business from New York residents. Thus, this justification cannot support the discrimination in the statute.

Similarly, since SBLI is not supported by the state treasury,[12] the state cannot discriminate in favor of those who make a contribution to the state fisc. The Privileges and Immunities Clause protects not only those who enter

---

[7] *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944).

[8] Appellee's Motion at 5.

[9] See Appellee's Motion at 3-4.

[10] *Ibid.*

[11] *Ibid.*

[12] See App. 6a.

the state to ply a trade but also those who enter the state seeking the services available there. *Doe v. Bolton*, 410 U.S. 179, 200 (1973). The lack of taxpayer contribution to SBLI distinguishes this case from those which uphold residency restrictions on state-financed educational services.[13] *Cf., Toomer v. Witsell, supra.*

The last justification is the most contrived. The purchase of SBLI by non-residents does not seriously threaten the local character of savings institutions. More importantly, there is nothing in the New York Banking Law or in the record of this case which indicates that New York is attempting to preserve the local character of its savings institutions. No such goal is listed in the Declaration of Policy, N.Y. Bank. Law §10, nor does any other provision of the statute appear to be aimed at accomplishing this goal. There are no residency restrictions on creditors, depositors or members of savings institutions, N.Y. Bank. Law §§ 234, 237, 378, and loans and investments by the savings institutions are not limited geographically to New York, N.Y. Bank. Law §§ 235, 380. Thus, the most important functions of savings institutions are not similarly restricted to New York residents. Further, appellee stipulated in the district court as to a lack of any knowledge concerning the legislative purpose of Section 268.[14] This justification must be dismissed as illusory.

---

[13] See Appellee's Motion at 4.

[14] Appellee contends that it was proper for the district court to have ignored this stipulation because it related only to the personal knowledge of the Superintendent of Banks. However, the Superintendent is the official responsible for administration of the statutes. Appellee fails to explain how it has been possible for the various New York Superintendents of Banks to enforce the alleged "local" purpose of the Act without being aware of such a purpose.

The justifications conjured up by the district court are not sufficient to overcome the constitutional prohibition against discrimination in the Privileges and Immunities Clause. The statute, therefore, should be declared unconstitutional.

CONCLUSION

The foregoing considered, the Court should note probable jurisdiction and give plenary consideration to this case.

Respectfully submitted,

ALAN MARK SILBERGELD
MARK A. CYMROT
1714 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 785-1906
Attorneys for Appellants